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KRISTIE CHAN

v.

KETUA PENGARAH JABATAN PENDAFTARAN NEGARA

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COURT OF APPEAL, PUTRAJAYA
SYED AHMAD HELMY JCA
ABDUL WAHAB PATAIL JCA
ABDUL AZIZ RAHIM JCA
C [CIVIL APPEAL NO: A-01-84-2011]
5 OCTOBER 2012

CIVIL PROCEDURE: *Declaration - Gender declaration - Application for - Application to be declared a woman and for amendment to gender*
D *information on identity card - Whether gender reassignment surgery changes person's gender to warrant change of gender description in identity card - Purpose of system of identity registration - Whether intended to be true and correct description of person's gender - Whether burden of proof discharged to warrant grant of declaration sought*

E ***CIVIL PROCEDURE:*** *Originating summons - Gender declaration - Application to be declared a woman and for amendment to gender information in identity card - Whether affidavit evidence supporting application in originating summons showed appellant entitled to declaration*
F *as to gender - Whether burden of proof discharged to warrant grant of declaration sought*

The appellant/plaintiff ('the appellant'), by way of an originating summons, applied for, *inter alia*, a declaration that the appellant, who had undergone a gender reassignment surgery, be declared a
G woman and for the respondent/defendant ('the respondent') to change the gender information on the identity card from "Male" to "Female". The respondent had rejected the application on the ground that the application failed to comply with the procedure and guideline set out in Arahan Jabatan Pendaftaran Negara,
H which had a procedure that requires a gender declaration from the court. The Judicial Commissioner ("JC") in dismissing the application, held, *inter alia*, that (i) the appellant was born a male, was given the name Chan Wang Fei and the birth certificate reflected this; (ii) there was no error as to identity to warrant a

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correction under s. 27 of the Registration of Births and Deaths Act 1957; (iii) s. 6(2) of the National Registration Act 1959 did not apply as there was no error as to the appellant's gender and (iv) there was nothing in the legislation pertaining to change of gender under a gender reassignment operation as the appellant had undergone. Dissatisfied with the said decision, the appellant appealed. The appellant deposed that the unchanged gender detail in the appellant's identity card caused difficulties in seeking employment, and facing immigration in China, Hong Kong and Thailand. The issue that arose herein was whether, on the basis of the affidavit evidence supporting the application in the originating summons, the appellant had shown that the appellant was entitled to the declaration as to gender as sought.

Held (dismissing appeal)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) Although the application was made in Malaysia and included an order for the respondent to change the identity card description of the appellant's gender from male to female, exhibits were only documents from Thailand and Hong Kong. There were no affidavits from the makers of those documents. Further, that the appellant had difficulty with immigration in Thailand raised the question whether the sex reassignment surgery was recognised. (para 23)

(2) There was no evidence, medical and psychiatric, from experts in Malaysia as to what was gender, what made a person a male or female or whether sex reassignment surgery changes a person's gender to warrant a change of the gender description in that person's identity card. Given the purpose of the system of identity registration, it was clearly intended to be a true and correct description of that person's gender. That intention seem to be defeated if the gender description was readily changed to facilitate obtaining employment, travel, education and other personal issues. (paras 24 & 25)

(3) Upon the evidence advanced in the affidavit in support of the originating summons, the appellant had failed to discharge the burden of proof to warrant the grant of the declaration and order sought. Hence, the Judicial Commissioner had not erred in his decision to dismiss the application in the originating summons. (para 26)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu/plaintif ('perayu'), melalui saman pemula, memohon, antara lain, deklarasi bahawa perayu, yang telah menjalani pembedahan perubahan jantina, diisytiharkan sebagai perempuan dan agar
B responden/defendan ('responden') menukarkan maklumat perayu pada bahagian jantina pada kad pengenalannya dari "Lelaki" kepada "Perempuan". Responden telah menolak permohonan atas alasan bahawa permohonan gagal mematuhi prosedur dan garis panduan yang dinyatakan di bawah Arahan Jabatan Pendaftaran
C Negara, yang mempunyai prosedur yang memerlukan perintah pengisytiharan jantina dari mahkamah. Pesuruhjaya Kehakiman ("PK") dalam menolak permohonan, memutuskan, antara lain, bahawa (i) perayu dilahirkan sebagai seorang lelaki, dan telah diberi nama Chan Wang Fei dan ini digambarkan melalui sijil
D kelahirannya; (ii) tiada kesalahan berhubungan identiti untuk mewajarkan pembetulan di bawah s. 27 Akta Pendaftaran Kelahiran dan Kematian 1957; (iii) s. 6(2) Akta Pendaftaran Negara 1959 tidak terpakai kerana tiada kesilapan berlaku berhubung dengan jantina perayu; dan (iv) tidak terdapat apa-apa
E dalam perundangan berkaitan dengan penukaran jantina di bawah pembedahan perubahan jantina seperti yang dijalani oleh perayu. Tidak berpuas hati dengan keputusan tersebut, perayu merayu. Perayu menyatakan bahawa butiran jantina yang tidak ditukar dalam kad pengenalan perayu telah menyebabkan kesukaran-
F kesukaran mencari pekerjaan, dan menghadapi imigresen di China, Hong Kong dan Thailand. Isu yang timbul di sini adalah sama ada, berdasarkan keterangan afidavit yang menyokong permohonan saman pemula, perayu telah dapat menunjukkan bahawa dia berhak mendapatkan deklarasi berkenaan jantina seperti yang dipohon.

G **Diputuskan (menolak rayuan)**
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

H **(1)** Walaupun permohonan dibuat di Malaysia dan termasuk perintah untuk responden menukar deskripsi kad pengenalan berkenaan jantina perayu daripada lelaki kepada perempuan, ekshibit-ekshibit hanyalah dokumen-dokumen daripada Thailand dan Hong Kong. Tiada afidavit-afidavit daripada pembuat dokumen-dokumen tersebut. Selanjutnya, kesukaran yang

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dihadapi perayu di imigresen di Thailand menimbulkan persoalan sama ada pembedahan perubahan jantina tersebut adalah diiktiraf.

(2) Tiada keterangan, dari segi perubatan dan psikiatri, daripada pakar-pakar di Malaysia mengenai apakah itu jantina, apa yang membuatkan seseorang itu lelaki atau perempuan atau sama ada pembedahan perubahan jantina menukarkan jantina seseorang itu sehingga ia mewajarkan perubahan deskripsi jantina dalam kad pengenalannya. Melihat pada niat sistem pendaftaran identiti, ia jelas bertujuan untuk menjadi deskripsi benar dan betul jantina seseorang itu. Niat itu seolah-olah tewas sekiranya deskripsi jantina sedia diubah untuk memudahkan seseorang itu mendapatkan pekerjaan, pelancongan, pelajaran dan beberapa isu-isu peribadi yang lain.

(3) Melihat kepada keterangan yang dikemukakan dalam afidavit sokongan saman pemula, perayu telah gagal melaksanakan beban bukti untuk mewajarkan deklarasi pembenaran perintah yang dipohon itu. Oleh itu, Pesuruhjaya Kehakiman tidak khilaf dalam membuat keputusannya untuk menolak permohonan saman pemula ini.

Case(s) referred to:
Bellinger v. Bellinger [2003] UKHL 21 ***(refd)***
Corbett v. Corbett [1970] 2 All ER 33 ***(refd)***
Corbett v. Corbett [1971] P 83 ***(refd)***
Wong Chiou Yong v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara [2005] 1 CLJ 622 HC ***(refd)***

Legislation referred to:
National Registration Act 1959, s. 6(1), (2)
Registration of Births and Deaths Act 1957, s. 27

For the appellant - Wong Kah Woh; M/s HL Lee & Co
For the respondent - Noor Hisham Ismail; SFC

[Appeal from High Court, Taiping; Originating Summons No: 24-102-2010]

Reported by Suhainah Wahiduddin

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JUDGMENT

Abdul Wahab Patail JCA:

[1] This appeal is against the dismissal by the learned Judicial Commissioner of the High Court of the application by way of an amended originating summons by appellant/plaintiff for the following orders:

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(a) Suatu perintah deklarasi bahawa plaintif yang telah menjalankan gender reassignment surgery diisytiharkan sebagai seorang perempuan;

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(b) Responden/defendan diperintahkan menukarkan maklumat perayu/plaintif di bahagian jantina pada kad pengenalannya dari "LELAKI" ke "PEREMPUAN";

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(c) Kos permohonan ini ditanggung oleh responden/defendan.

[2] The appellant relied upon that grounds that:

(a) the appellant had applied, with supporting documents, to have the change made to the appellant's identity card;

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(b) the Ketua Pengarah Pendaftaran had rejected the application on the ground the application failed to comply with the procedure and guideline set out in Arahan Jabatan Pendaftaran Negara Bil 9/2007, Perenggan 5.7.2(a) "Perintah mahkamah yang mengandungi butir-butir pengisytiharan jantina baru pemohon"; and

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(c) if an order of court is obtained, an appeal could be made to the Jabatan Pendaftaran Negara for reconsideration.

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[3] The grounds given by the learned Judicial Commissioner for the dismissal may be summarised as follows:

(a) The appellant was born a male, was given the name Chan Wang Fei and the birth certificate reflected this.

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(b) There was no error as to identity to warrant a correction under s. 27 of the Registration of Births and Deaths Act 1957.

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(c) Section 6(2) of the National Registration Act 1959 does not apply as there is no error as to the appellant's gender.

(d) Nothing in the legislation pertains to change of gender under a gender reassignment operation as the appellant had undergone.

(e) Relied upon *Corbett v. Corbett* [1970] 2 All ER 33 and *Bellinger v. Bellinger* [2003] UK HL 21.

(f) Felt that the court ought not recognise to what is wilfully created and artificial, and contrary to the state at the time of birth.

(g) It is another matter if the appellant had features of both sexes and there was a choice by the appellant or the appellant's guardian, and supported medically.

(h) If allowed there would be a contradiction between the gender in the birth certificate and the identity card.

(i) The Jabatan Pendaftaran Negara has no guide or policy on gender reassignment.

(j) To the learned Judicial Commissioner, to allow the application would create or invite hidden confusion in the society and official administration of the country.

(k) Whatever change made to the gender description in the identity card would not give an accurate description of the fact the appellant had a gender reassignment operation, and a special indication ought to be made.

(l) To the learned Judicial Commissioner, if the application is allowed, the existing law must recognise the status.

(m) The learned Judicial Commissioner feared

> Dikhuatiri golongan senasib dengan pemohon akan menuntut segala hak mereka di bawah Undang-Undang dan Perlembagaan dalam menjalani kehidupan seharian termasuklah pekerjaan, hak perkahwinan, kepusakaan dan lain-lain aspek kehidupan. Akan timbul suatu ketidaktentuan keadaan di dalam status jantina terkini, situasi yang mengundang suatu impak yang besar dalam masyarakat dan pentadbiran negara samada secara langsung mahupun tidak langsung. Sebab itulah saya katakan yang saya tidak bersedia untuk membenarkan permohonan ini kerana ianya

A bukan sahaja dalam ketiadaan undang-undang yang mentadbir situasi ini tetapi dilihatkan lebih mirip kepada perkara polisi yang harus dilihat oleh Kerajaan dan mungkin juga oleh Parlimen dan bukan melalui penyelesaian sementara secara mudah melalui Mahkamah.

B **[4]** The application does not involve amendment of the birth certificate under the Registration of Births and Deaths Act 1957. A birth certificate reflects the gender apparent physically at the time of birth. See *Wong Chiou Yong v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* [2005] 1 CLJ 622. That C a birth certificate cannot be amended is irrelevant in this case as the application does not seek such amendment.

[5] Section 6(1) of the National Registration Act 1959 gives wide powers to the Minister to make regulations for the purpose D of the Act, and includes the matters set out in s. 6(2). The Act empowers the Minister to decide upon the policy and make regulation pertaining to gender recognition. It does not in itself deal with amendments. Nor is it for the court to be so concerned about administrative ramifications as to refuse consideration E because of such ramifications, when such issues for the executive to deal with and resolve in implementing a national registration system.

[6] In our view, the learned Judicial Commissioner erred in F taking into consideration matters that are irrelevant to the consideration to the specific matter before the court.

[7] The question, however, remains. This court has to consider whether, on the basis of the affidavit evidence supporting the application in the originating summons, the appellant had shown G that the appellant is entitled to the declaration as to gender as sought by the appellant.

[8] A declaration that a person is currently of a gender other than that such person was born as is not a simple issue. As Lord H Nicholls of Birkenhead said in *Bellinger v. Bellinger* [2003] UKHL 21, whether a person can change the sex with which he or she is born is a statement in over-simplified and question-begging form. The specific question in that case was whether the petitioner Mrs Elizabeth Bellinger was validly married to Mr Michael I Bellinger. The House of Lords had to consider the relevant legislation. It was held that since the Matrimonial Causes Act

1973 requires that a marriage is void unless the parties were respectively male and female, the question was whether Mrs Elizabeth Bellinger was female within the meaning of that expression in the statute. A

[9] Lord Nicholls continued his speech in *Bellinger v. Bellinger* as follows: B

> 34. My Lords, I am profoundly conscious of the humanitarian considerations underlying Mrs. Bellinger's claim. Much suffering is involved for those afflicted with gender identity disorder. Mrs Bellinger and others similarly placed do not undergo prolonged and painful surgery unless their turmoil is such that they cannot otherwise live with themselves. Non-recognition of their reassigned gender can cause them acute distress. I have this very much in mind. C
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> 35. I also have in mind that increasingly, in the more compassionate times in which we live, there is an international trend towards recognising gender reassignment and not condemning post-operative transsexual people to live in what was aptly described by the European Court of Human Rights in the Goodwin case as an intermediate zone, not quite one gender or the other. And in this country gender reassignment has already received legal recognition for some purposes, for example, for the purpose of the discrimination legislation, in section 2A of the Sex Discrimination Act 1975. This section was introduced into the statute by the Sexual Discrimination (Gender Re-assignment) Regulations 1999 (SI 1999/1102). D E F
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> 36. Despite this, I am firmly of the view that your Lordships' House, sitting in its judicial capacity, ought not to accede to the submissions made on behalf of Mrs Bellinger. Recognition of Mrs Bellinger as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 would necessitate giving the expressions 'male' and 'female' in that Act a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex. G H
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> 37. This would represent a major change in the law, having far reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited I

A for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject.

B **[10]** The House of Lords, in that case, concluded that the marriage was not valid under the English legislation in the context of the meaning of the term "female" in the Matrimonial Causes Act 1973.

C **[11]** Ormrod J dealt with a similar question in similar context in *Corbett v. Corbett* [1971] P 83, and had arrived at the same conclusion. In both cases, the parties had wanted a declaration their marriage was not valid.

D **[12]** These cases serve to show gender is a multi-faceted question, and not involving the desire of the applicant alone, but involve consideration of chromosomal, gonadal, genital and psychological factors.

E **[13]** In the instant appeal before us, the appellant's application was made upon the recommendation of the respondent to seek a declaration as to the appellant's gender. The respondent had given the appellant an opportunity to establish in a court of law that the appellant is now a female.

F **[14]** The appellant attempted to do so by way of an originating summons. The procedure relied upon affidavit evidence. The appellant filed an affidavit in support dated 29 April 2010 detailing the grounds relied upon. True copies of supporting documents were exhibited.

G **[15]** The affidavit in reply of Md Solehan bin Omar, Pengarah Bahagian Kad Pengenalan in the Ibu Pejabat Jabatan Pendaftaran Negara, Malaysia, Putrajaya, affirmed an affidavit where the material part requiring consideration is as follows:

H 9. Saya sesungguhnya menyatakan bahawa plaintif di dalam permohonannya kepada Jabatan Pendaftaran Negara untuk meminda butiran dalam kad pengenalan gagal untuk mengemukakan Perintah Mahkamah yang mengandungi butir-butir pengisytiharan jantina baru plaintif.

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10. Oleh yang demikian, saya sesungguhnya menyatakan bahawa penukaran maklumat plaintif di bahagian jantina pada kad pengenalannya dari Lelaki ke Perempuan tidak boleh dibuat memandangkan tiada Perintah Mahkamah yang mengisytiharkan jantina baru plaintif dikemukakan oleh plaintif bersama-sama dengan Borang Permohonan Pindaan Butiran Dalam Kad Pengenalan.

11. Seterusnya saya menyatakan bahawa Arahan Jabatan Pendaftaran Negara tersebut adalah terpakai kepada pindaan maklumat dalam kad pengenalan sahaja. Manakala tiada pindaan maklumat boleh dibuat ke atas Sijil Kelahiran plaintif memandangkan peruntukan undang-undang dengan jelas memperuntukkan bahawa Sijil Kelahiran hanya boleh dipinda sekiranya terdapat kesilapan dibuat semasa pendaftaran kelahiran. Di dalam kes plaintif, tiada sebarang kesilapan berkenaan dengan jantina plaintif direkodkan dalam Sijil Kelahirannya semasa pendaftaran kelahiran beliau dibuat.

12. Kecuali apa yang dinyatakan di dalam afidavit ini, saya sesungguhnya menyatakan bahawa saya tiada pengetahuan mengenai pengataan-pengataan yang terkandung di dalam afidavit plaintif.

[16] Since the only direct response in the affidavit in reply to the assertions in the affidavit of the appellant is that the deponent had no knowledge but did not put the appellant to proof, and since there was application made to cross-examine the appellant, the correct inference is that those facts were not disputed. The affidavit in reply, *inter alia*, confirmed that the Jabatan Pendaftaran Negara had a procedure that requires a gender declaration from the court.

[17] The affidavit in reply makes it abundantly clear also that the said Arahan Jabatan Pendaftaran Negara applied to the amendment in the identity card only and not the birth certificate. That the appellant's birth certificate states the gender as male while an amended identity card if allowed states the gender as female may raise a question in the mind of a person to whom the documents are produced, but that in our mind is no legitimate cause of confusion. It simply means there had been a recognised gender change, and the official document accorded to the appellant recognition of his current though acquired gender as a female. That some party may be confused is no ground for denying to the appellant a true statement of the appellant's current gender even if it is acquired.

[18] We note that para. 5.7.2(a) of the Arahan Jabatan Pendaftaran Negara Bil 9/2007, requires as part of the application for a change of registration of gender a "Perintah Mahkamah yang mengandungi butir-butir pengisytiharan Jantina baru pemohon". It means that the Jabatan Pendaftaran Negara would rely upon the judicial process to determine the question of the current gender of the appellant. This is borne out by the amended originating summons filed by the appellant who sought the following orders:

(i) Suatu Perintah deklarasi bahawa plaintif yang telah menjalankan gender reassignment surgery diisytiharkan sebagai seorang perempuan;

(ii) Defendan diperintahkan menukarkan maklumat plaintif di bahagian jantina pada kad pengenalannya dari "LELAKI" ke "PEREMPUAN";

(iii) Kos permohonan ini ditanggung oleh defendan;

(iv) Perintah-perintah atau relif-relif selanjutnya sepertimana mahkamah yang mulia ini fikirkan adil dan suaimanfaat.

[19] The grounds relied upon, and more particularly set out in the affidavit, were:

(i) Plaintif telah menjalankan "Gender Reassignment Surgery" pada 15 Disember 2006 dengan berjayanya menukarkan jantina fizikalnya dari "lelaki" ke "perempuan";

(ii) Permohonan pindaan dan/atau penukaran maklumat ini adalah perlu untuk menunjukkan jantina plaintif sekarang.

[20] The appellant deposed that the unchanged gender detail in the appellant's identity card caused difficulty in seeking employment, facing immigration in China, Hong Kong and Thailand, continuing studies and being looked down upon by certain quarters.

[21] The evidence exhibited in support of the application are *inter alia* as follows:

(a) A medical certificate dated 11 December 2006 from a doctor at Praram 9 Hospital, Bangkok. The doctor certified that the appellant is a 29-year-old male to female transsexual who

presented a request for sex reassignment surgery. It was certified the appellant did not present severely psychotic symptoms and was ready for surgical treatment.

(b) A Medical Certificate dated 5 January 2007 from Piyavate Hospital that:

(i) the appellant:

(a) Was treated between 14 December 2006 - 18 December 2006;

(b) Had complained of a desire for gender transition;

(c) Was diagnosed with a gender identity disorder;

and made the comment that

(ii) Sex reassignment surgery was conducted on 15 December 2006.

(c) A copy of the operative record from Piyavate Hospital describing the surgery;

(d) A certificate dated 29 October 2008 from Dr Peter T W Siu, Hong Kong that the appellant:

(i) had been a patient for two years;

(ii) had complete feminine outlook and behaviour now; and

(iii) hoped that the Malaysian Government can give her help to correct her sexual identity in all her official documents because of her medical and psychological conditions.

[22] The affidavit in reply for the respondent had responded with "no knowledge" but did not challenge these documents. We considered whether it means we must conclude that the respondent does not dispute the grant of the declaration sought. We concluded that since the appellant was not put to proof as to the authenticity of these documents, the court must accept the documents as genuine. But in the context of a matter where it was the respondent who had required the appellant to seek a gender declaration from the court, a non-dispute as to the authenticity of the documents does not warrant a necessary inference that the respondent conceded as to the declaration sought.

[23] We return to the evidence exhibited in the affidavit affirmed by the appellant in support of the originating summons. We make the following observations. Firstly, although the application is made in Malaysia and included an order for the respondent to change identity card description of the appellant's gender from male to female, exhibits are only documents from Thailand and Hong Kong. There are no affidavits from the makers of those documents. Secondly, that the appellant had difficulty with immigration in Thailand raises the question in our minds whether the sex reassignment surgery was recognised.

[24] These lead us to the observation that there is no evidence, medical and psychiatric, from experts in Malaysia:

(a) what is gender;

(b) what makes a person a male or female;

(c) whether sex reassignment surgery changes a person's gender to warrant a change of the gender description in that person's identity card.

[25] Given the purpose of the system of identity registration, it is clearly intended to be a true and correct description of that person's gender. That intention seem to be defeated if the gender description is readily changed to facilitate obtaining employment, travel, education and other personal issues.

[26] We conclude that upon the evidence advanced in the affidavit in support of the originating summons, the appellant had failed to discharge the burden of proof to warrant the grant of the declaration and order sought. Hence, although some irrelevant matters had been taken into consideration by the learned Judicial Commissioner, the learned Judicial Commissioner had not erred in his decision to dismiss the application in the originating summons.

[27] For the foregoing reasons, we dismiss this appeal. Recognising that the issue is not frivolous, we make no order as to costs.